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No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN ROE, PETITIONER,

v.

KENTUCKY BAR ASSOCIATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

Whether Kentucky Supreme Court Rule 3.150 (SCR 3.150), requiring confidentiality in Bar disciplinary cases, violates the First Amendment of the Constitution of the United States on its face and as applied to John Roe, petitioner.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties named in the caption, John Roe, petitioner, and the Kentucky Bar Association, respondent, were the sole parties below and are the sole parties to this petition. Neither party is incorporated and, therefore, neither party has any parent companies or nonwholly owned subsidiaries.

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JOHN ROE, PETITIONER,

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KENTUCKY BAR ASSOCIATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner respectfully requests the issuance of a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Confidential Order of the Supreme Court of Kentucky, 96-SC-529 (App., *infra*, 1a), is unpublished. The Findings of Fact, Conclusions of Law and Recommendation of Board of Governors of the Kentucky Bar Association, KBA File 4766, (App., *infra*, 2a-7a), is unpublished. The Report of Trial Commissioner, KBA File 4766, (App., *infra*, 8a-11a), is unpublished.

JURISDICTION

The Supreme Court of Kentucky entered its judgment on August 29, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RULE 14.1(f) RECITATION

The following constitutional provisions and Kentucky Supreme Court Rule are involved in this case:

"No state shall ... deprive any person of life, liberty, or property, without due process of law ..." U.S. CONST. amend. XIV, § 1.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court: (a) Upon request of the Retirement and Removal Commission, the Director shall make available to the Commission any of its records pertinent to an investigation by the Commission. (b) Upon request of the Trustees of the Clients' Security Fund, the Director shall make available to the Trustees any record pertinent to the investigation of an application for relief under consideration by the Trustees and said records shall not be made public by the Trustees unless so ordered by the Court. (c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense

> of his case and the practice of his profession. (d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

Rule 3.150(1) of the Kentucky Supreme Court

STATEMENT

The petitioner, Mr. Roe[1], is a member of the Kentucky Bar Association. Mr. Roe represented X Corp., the debtor in possession in a Chapter 11 bankruptcy proceeding filed in the United States Bankruptcy Court for the Western District of Kentucky.

In 1993, X Corp. elected to file a Chapter 11 petition and pursue its plan of liquidation. X Corp., as the debtor in possession, acted as a fiduciary for the benefit of all its creditors and shareholders. As the debtor in possession, X Corp. had the power and duty to employ a lawyer to represent it as debtor in possession. X Corp. chose to employ Mr. Roe. In March 1993, Mr. Roe filed on behalf of X Corp. an "Application for Order Authorizing Debtor in Possession to Employ and Appoint Attorney".

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[1] The name of the Petitioner has been changed for purposes of complying with the very same confidentiality rule the constitutionality of which is the subject of this challenge. When contacted before the filing of this Petition, counsel for the Kentucky Bar Association could not agree that this Petition would not be a violation of the confidentiality rule. That rule is so broad, and the Kentucky Bar Association's interpretation of that rule has been so strict, that the Petitioner cannot even use his own name to determine whether the rule improperly restricts his freedom of speech.

X Corp., with Mr. Roe as its counsel, liquidated all of its assets. The Court confirmed X Corp.'s liquidation plan over the objection of two minority shareholders, including Joe Smith ("Mr. Smith"). As a minority shareholder and creditor, he opposed the liquidation. In a final effort to thwart X Corp.'s bankruptcy plan and to intimidate counsel for X Corp., Mr. Smith decided to file bar charges against Mr. Roe. On or about July 20, 1994, Mr. Smith filed a letter with the Kentucky Bar Association, which he copied to the Louisville Bar Association and to counsel for the parent corporation and primary creditor of X Corp. On or about August 8, 1994, Mr. Smith filed a Complaint in the form of an Affidavit against Mr. Roe with the KBA (the "Bar Complaint").

Mr. Roe considered the allegations made by Mr. Smith to be meritless and part of a bad faith effort to interfere with the closure of the action. Mr. Roe believed that he had to oppose the Bar Complaint for the benefit of his client, X Corp. He also believed that he should have the right to claim compensation for his defense of the Bar Complaint. He believed the Bar Complaint to be a final effort by Mr. Smith to interfere with the liquidation plan. For these reasons, Mr. Roe believed he had to inform the Court of the filing of the Bar Complaint and of its content.

In August 1994, Mr. Roe attached as one of several exhibits to a pleading filed in Bankruptcy Court the Bar Complaint and letter filed against him by Mr. Smith. The pleading is styled "Response to Appellant's Motion for Stay of Judgment Pending Appeal and for Attorney Fees to Defend Bar Complaint Filed by Joe Smith." Mr. Roe sent the pleading with the Bar Complaint attached as an exhibit to only four attorneys representing parties in the bankruptcy proceeding.

The Bankruptcy Court itself found the document of value and significance as reflected in the Court's Memorandum Opinion of September 19, 1994. The Kentucky Bar Association ultimately dismissed the Bar Complaint of Joe Smith against Mr. Roe. As found by the Trial Commissioner, the Court "viewed the Bar Complaint filed by Joe Smith to be a 'sour grapes' letter by a 'disgruntled creditor' on a 'misguided crusade'."

Subsequent to Mr. Roe filing the Bar Complaint of Joe Smith as an attachment to a pleading in the Bankruptcy Court, the Kentucky Bar Association filed a second Bar Complaint against Mr. Roe, alleging that by filing the Bar Complaint of Joe Smith as an attachment to a pleading in the Bankruptcy Court, Mr. Roe violated the confidentiality provisions of SCR 3.150 and, by that violation, further violated SCR 3.130-3.4(c), which provides, in relevant part, that no lawyer shall "knowingly or intentionally disobey an obligation under the rules of a tribunal." The Kentucky Bar Association formally charged Mr. Roe with having so violated SCR 3.150 and SCR 3.130-3.4(c) and submitted the issue to a Trial Commissioner for factual findings.

The Trial Commissioner presented his findings and report to the Board of Governors of the Kentucky Bar Association (the "Board of Governors") and on the basis of those findings the Board of Governors found that Mr. Roe violated SCR 3.150 and SCR 3.130-3.4(c). The Board of Governors then recommended to the Supreme Court of Kentucky that Mr. Roe be punished by private reprimand and that Mr. Roe pay the costs in the matter.

Without any lengthy written opinion, the Supreme Court of Kentucky, in a four to three decision, adopted the findings, recommendations and penalties suggested by the Board of Governors. The dissenters found that "Mr. Roe's actions in this case were not inconsistent with the exceptions found in SCR 3.150(c)."

Mr. Roe raised the issue of the constitutionality of SCR 3.150 in his Brief of Respondent to Board of Governors, arguing that "[a] broad reading of the Confidentiality Rule would violate Mr. Roe's right to freedom of speech." Although the Board of Governors did not specifically address this argument, its recommendation that Mr. Roe be privately reprimanded implicitly rejected the argument. Again, Mr. Roe preserved the issue in his Brief of Respondent in Opposition to Recommendation of Board of Governors, arguing as he had before the Board of Governors. In adopting the Board's findings, the Supreme Court of Kentucky also implicitly rejected Mr. Roe's constitutional challenge to the rule.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION.

There are compelling reasons for the Court to grant Mr. Roe's petition for a writ of certiorari. Contrary to a growing national interest in public access to bar association disciplinary proceedings[2] and firmly established First Amendment law (as shown in detail below), the Supreme Court of Kentucky privately reprimanded Mr. Roe for disclosing the Bar Complaint of Joe Smith on the ground that the disclosure violated the confidentiality provisions of that Court's rules.

In so ruling, and by necessary implication finding that the rule in question is not unconstitutional, the Supreme Court of

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[2] *See* W. Thurm, *The First Amendment, Attorney Discipline and Public Accountability--Doe v. Supreme Court of Florida and the Florida Bar, 734 F. Supp. 981 (S.D. Fla. 1990)* (citing AMERICAN BAR ASSOCIATION COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, REPORT TO THE HOUSE OF DELEGATES (May 1991)).

Kentucky has decided an important question of federal law in a way that substantively conflicts with decisions of United States appellate courts concerning the First Amendment, warranting review in the form of a writ of certiorari. *See* Rule 10(b) of the Rules of the Supreme Court of the United States. Moreover, to the extent that this is a case of first impression, review is appropriate on the ground that the Supreme Court of Kentucky has decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States. *See* Rule 10(c) of the Rules of the Supreme Court of the United States.

The "Rules of the Supreme Court," adopted by the Supreme Court of the State of Kentucky, provide that any information concerning a disciplinary action filed against a lawyer admitted to practice in Kentucky shall not be made public. The rule establishing confidentiality provides, in pertinent part:

> (1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the Court: . . . (c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession. (d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

Rule 3.150 of the Kentucky Supreme Court (the "Rule"). While the state may have an interest in establishing and controlling

disciplinary proceedings, the state[3] "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *N.A.A.C.P. v. Button*, 371 U.S. 415, 439 (1963). Because the Rule abridges the First Amendment freedom of expression of Mr. Roe and all other participants in bar disciplinary proceedings, the Rule is unconstitutional on its face and as applied to Mr. Roe.

II. BECAUSE THE RULE IS CONTENT-BASED, IT MERITS STRICT SCRUTINY.

In determining whether a statute, rule or regulation promulgated by a state actor violates an individual's freedom of expression protected by the First Amendment, the first issue is whether the restriction is content-based. *See, e.g., R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). A content-based restriction regulates speech on the basis of the ideas or information conveyed by the speech. Conversely, a restriction on free speech is content-neutral if the restriction is "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)); *see also Police Department v. Mosley*, 408 U.S. 92 (1972).

There is little question that the Rule is content-based. The Rule is content-based because the effect of the Rule is to restrict the disclosure of the information conveyed in the speech. The

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[3] The action of the Kentucky Supreme Court enforcing the bar disciplinary rules is state action for the purpose of the First and Fourteenth Amendments. This Court has previously ruled that a "State Supreme Court's enforcement of disciplinary rules transgressed by members of its own bar was state action." *N.C.A.A. v. Tarkanian*, 488 U.S. 179, 194 (1988) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

Rule only restricts speech which conveys information concerning the bar disciplinary proceeding.

Furthermore, in disciplinary proceedings contesting similar confidentiality provisions, states have offered various rationales for confidentiality rules. These rationales are based upon concerns about publication of the content of the speech. For instance, other states have reasoned, *inter alia*, that confidentiality is necessary to protect the reputation of the defendants and the integrity of the disciplinary process. *See, e.g., Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989); and *Doe v. State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Fla. 1990). By enacting a similar provision, it may be presumed that Kentucky has determined that the same protection is necessary in Kentucky for similar reasons. However, as the restriction is justified on the basis of the danger of disclosing the confidential information, the restriction is content-based.

Lower federal courts have agreed that confidentiality provisions prohibiting disclosure of information concerning disciplinary proceedings are content-based. In *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990), for instance, the district court found that a Florida statute which prohibited participants in bar disciplinary proceedings from disclosing any information regarding the proceedings was content-based. Other lower courts have found similar confidentiality provisions to be content-based. *See, e.g., Providence Journal Co. v. Newton*, 723 F. Supp 846 (D.R.I. 1989) (holding that the confidentiality requirement which prohibits public discussion of ethics complaints against public officials is a prototypical content-based restriction); *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440 (4th Cir. 1990) (holding that the statute prohibiting disclosure of communications to the Judicial Inquiry and Review

Commission was not content-neutral); *Doe v. State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520 (S.D. Fla. 1990) (holding that a provision of the state constitution which required confidentiality of all proceedings before the Judicial Qualifications Commission was content-based); *Lind v. Grimmer*, 30 F.3d 1115 (9th Cir. 1994) (holding that the statute prohibiting disclosure of information concerning investigations undertaken by the state's campaign spending commission was content-based), *cert. denied*, 115 S.Ct. 902 (1995).

Government regulation of speech based on content is presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The First Amendment protects individuals from state action which endeavors "to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Any such restriction of expression would "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Mosley*, 408 U.S. at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Because state action which restricts expression on the basis of content is presumptively invalid and violates the principle underlying the First Amendment, such state action is subjected to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (describing the standard as "the most exacting scrutiny," quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

III. THE RULE DOES NOT SURVIVE STRICT SCRUTINY.

The United States Supreme Court has determined that in order to justify content-based restrictions, the state must show (1) that the regulation is necessary to serve a compelling state interest, and (2) that the regulation is narrowly drawn to achieve that end. *See Boos v. Barry*, 485 U.S. 312 (1988). *See also,*

Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). In this case, the Rule is facially unconstitutional because it regulates protected speech without a compelling state interest and is not narrowly drawn. The Rule, as applied, is unconstitutional because, unless and until Mr. Roe had been cleared from any wrongdoing, the state, without a compelling reason, prohibits Mr. Roe from disclosing any information regarding the proceedings.

First Amendment challenges to confidentiality provisions have been raised in lower courts in at least four contexts: (1) bar disciplinary proceedings, (2) state government ethics commission proceedings, (3) judicial commission proceedings, and (4) campaign spending commission proceedings. *See Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990) (bar disciplinary proceedings); *Lind v. Grimmer*, 859 F. Supp. 1317 (D. Hawaii 1993) *aff'd*, 30 F.3d 1115 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995) (Campaign Spending Commission), *aff'd*, 30 F.3d 1115 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995); *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Cir. 1994) (Judicial Review Council); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (Ethics Commission). While the Court is asked here to consider a state rule with regard to attorney disciplinary hearings, the decisions regarding each of these confidentiality provisions are instructive for the following reasons.

First, in each context, the state actor attempts to render special proceedings confidential. Second, in each context, the confidential information falls into the same general categories: (1) information concerning the substance of a complaint or testimony, (2) information concerning the fact that a complaint was filed or testimony was given, or (3) information obtained at a hearing. *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 110 (2nd Cir. 1994) (based upon analysis of prior cases). The

state's interest in restricting a complainant, defendant or witness from disclosing certain information depends on the category of the information restricted and the duration of the restriction. *See Id.* Finally, in each context, the state's alleged justifications for the restriction are similar. *See Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990); *Lind v. Grimmer*, 859 F. Supp. 1317 (D. Hawaii 1993), *aff'd*, 30 F.3d 1115 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995); *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Cir. 1994); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989). Because confidentiality provisions enacted in other jurisdictions and tested in other courts are similar to Kentucky's confidentiality provision, restrict the disclosure of the same categories of information, and are allegedly justified by similar state interests, decisions regarding those provisions are instructive. *See Id.*

A. The Rule Is Facially Unconstitutional Because It Is Overbroad.

As with confidentiality provisions enacted in other states and struck down by other courts, the confidentiality provision adopted by Kentucky's Supreme Court violates the First Amendment. By restricting all categories of information and for an indefinite duration, the Rule violates the First Amendment rights of all complainants, defendants, and witnesses who participate in bar disciplinary proceedings.

As stated above, other states have proffered justifications for confidentiality provisions in court proceedings challenging the constitutionality of their statute. In *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990), the court considered whether a bar rule prohibiting a participant in a disciplinary proceeding from disclosing information regarding the proceeding violated the First Amendment. In that case, the Florida Bar offered four principal justifications for the rule: (1)

confidentiality encouraged the filing of complaints and the cooperation of witnesses; (2) confidentiality protects the reputation of lawyers; (3) confidentiality protects the public confidence in the Bar; and (4) confidentiality facilitates the investigation of the complaint. *Id.* at 985-987. As Kentucky's confidentiality provision is similar in effect to Florida's provision, it is reasonable to assume that Kentucky's Rule was designed to further similar interests.

Despite the purported justifications, the Rule is unconstitutional on its face because it is overbroad. A statute or rule is overbroad if "in all its applications [it] directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66 n.13 (1984). The Rule violates the First Amendment because in regulating the bar disciplinary proceedings, it regulates protected speech. Specifically, the Rule indefinitely and indiscriminately restricts participants in a disciplinary proceeding from disclosing information regarding various categories of information involved in those proceedings.

1. The Rule Is Overbroad Because it Restricts the Right of an Individual to Disclose the Substance of the Complaint or Testimony and the Fact of Filing the Complaint.

a. The State Has No Compelling Interest in Prohibiting a Participant in the Disciplinary Proceedings from Disclosing Information Regarding the Substance of the Complaint.

The Rule prohibits, except in limited circumstances, the publication of any information regarding disciplinary proceedings. This includes any information regarding the

substance of a complaint, even if the Court finds that the defendant is guilty of misconduct. Therefore, if an individual decides to file a complaint, he is indefinitely barred from discussing the merits of the complaint. The state does not have a compelling interest in prohibiting a participant from disclosing information of which he has first-hand knowledge:

> Whether the state may prohibit the disclosure of the substance of an individual's complaint or testimony merits little discussion. Penalizing an individual for publicly disclosing complaints about the conduct of a government official strikes at the heart of the First Amendment, and we agree . . . that such a prohibition would be unconstitutional.

Kamasinski v. Judicial Review Council, 44 F.3d 106, 110 (2nd Cir. 1994) (citations omitted) (holding that a state may not prohibit the disclosure of the substance of a complaint filed against a judge); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (holding a statute unconstitutional which prohibited an individual from publicizing the content of any complaint before a determination of probable cause). Notwithstanding the fact that the *Kamasinski* court considers a statute protecting judges, if the state has no compelling interest in protecting a judge from public disclosure of the substance of a complaint, then the state has no compelling interest in protecting an attorney from similar disclosure. Simply put, a participant in a bar disciplinary proceeding should not lose the right to speak concerning facts, circumstances and allegations of which he has personal knowledge and which exist independently of any investigation, but which happen to be connected with a disciplinary proceeding. *See also Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083 (D. Conn. 1992), *aff'd* 44 F.3d 106 (2d Cir. 1994).

Similarly, a state does not have a compelling interest in prohibiting witnesses from disclosing the substance of their testimony before a disciplinary board. *See First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3rd Cir. 1985) (holding that the regulation which prohibited nonparty witnesses in proceedings before a Judicial Inquiry and Review Board from disclosing the substance of their testimony was unconstitutional). In light of the fact that a witness may be forever barred from discussing or publicizing the information which was the subject of his testimony, the *First Amendment Coalition* court found that, "no state interest [is] strong enough to justify such a sweeping measure." *First Amendment Coalition*, 784 F.2d at 478.

b. The State Has No Compelling Interest in Prohibiting a Participant in Disciplinary Proceedings from Disclosing the Fact That a Complaint Has Been Filed.

Next, the state has no compelling interest in prohibiting the disclosure of the fact that a complaint has been filed. Allegedly, confidentiality protects lawyers from injuries which would result from the filing of frivolous complaints and public knowledge that such complaints are being investigated by the Bar. However, "protecting the reputation of an individual, or indeed the profession as a whole, would be insufficient justification for absolutely barring the dissemination of truthful information." *Doe v. Supreme Court of Florida*, 734 F. Supp. 981, 986 (S.D. Fla. 1990) (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978)). In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 831 (1978), the Supreme Court considered the merits of a state statute protecting the confidentiality of complaints against state judicial officers. The Supreme Court held that the state laws prohibiting strangers to the inquiry from divulging information regarding the proceedings

violated the First Amendment. Although expressly limited to statutes which sought to punish strangers to the proceedings, the United States Supreme Court stated that

> neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality. Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-842 (1978) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 272-273). This logic was applied by a federal district court to a statute restricting the dissemination of information regarding a bar disciplinary proceeding. *See Doe v. Supreme Court of Florida*, 734 F. Supp. at 986. Just as protecting the reputation of state judges does not justify restricting an individual's freedom of speech, the court found that protecting the reputation of attorneys does not justify encroaching upon an individual's free speech rights. *Id.*

Moreover, as stated by court in *Doe State of Florida Judicial Qualifications Commission*, 748 F. Supp. 1520, 1527-1528 (S.D. Fla. 1990), America is a litigious society. Frivolous complaints are filed in every court and before every administrative body.

> The notion that the people are somehow unable to determine for themselves what to believe or not believe about issues concerning the body politic is belied by the history of a free people involved in self governance. The danger that publication of filing a complaint will necessarily result in overvaluation of its merits is largely illusory.

Id. The protection of the reputation of attorneys, therefore, is neither constitutionally cognizable, nor necessary.

Similarly, like the integrity of the courts, the protection of the Bar's integrity and public confidence in the Bar is not a compelling state interest:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 270-71 (1941)). Quoting *Landmark*, the federal district court, in *Doe v. Supreme Court of Florida*, found that an imposition on free speech similar to the prohibition on speech mandated in the Rule is more likely to engender resentment than to promote the integrity of the Bar. *Doe v. Supreme Court of Florida*, 734 F. Supp. at 987.

Finally, it has been argued that the state has a compelling interest in encouraging the filing of complaints. However, it is unclear as to whether the confidentiality provision encourages or discourages complaints. Just as a potential complainant might be dissuaded from filing a complaint if he believes that the filing may become public, a potential complainant might be dissuaded from filing a complaint if he knows that he will be subject to a permanent bar from speaking out about the subject of the complaint. *Doe v. Supreme Court of Florida,* 734 F. Supp. at 985.

2. The Rule Is Overbroad Because the Prohibition Against Disclosure Is Indefinite.

Not only is the Rule overbroad in that it restricts the right of an individual to discuss the substance of the complaint and the fact the of filing of the complaint, it is also overbroad in that it acts as an indefinite bar upon the right of the individual to disclose the information:

> While the validity of some of these prohibitions [e.g. prohibition against disclosing the fact of the filing of the complaint and against a third party to the investigation disclosing anything learned about the investigation] as applied during the pendency of the investigation may be arguable, we need not rule on that question because the prohibitions are not so limited. Once the Commission has made its probable cause determination, their application clearly is unconstitutional.

Lind v. Grimmer, 30 F.3d 1115, 1123 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 902 (1995) (holding unconstitutional a statute which prohibits the disclosure of information concerning

investigations undertaken by the state's campaign spending commission). After the determination as to probable cause has been made, "the state may not constitutionally prohibit disclosure by a complainant or witness of his complaint, his participation in the preliminary investigation . . . or the disposition of the complaint." *Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083, 1097 (D. Conn. 1992).

B. THE RULE IS UNCONSTITUTIONAL AS APPLIED TO MR. ROE BECAUSE IT PROHIBITS THE PROTECTED PARTY FROM DISCLOSING INFORMATION.

1. The State Does Not Have a Compelling Interest in Prohibiting a Defendant in a Bar Disciplinary Proceeding from Publishing a Complaint.

Even if Kentucky has an interest in prohibiting the complainant from disclosing the fact that a complaint was filed and the substance of the complaint, Kentucky has no such interest in prohibiting Mr. Roe, *the defendant* in a disciplinary proceeding, from disclosing the information. The Rule, in violation of the First Amendment, prohibited Mr. Roe from disclosing the fact that a complaint was filed against him and the substance of the complaint.[4]

As stated above, a state never has a compelling interest in restricting the right of any individual to disclose the substance of the complaint. *See* Section III.A.1.a., *supra*. Thus, insofar as the Kentucky Supreme Court is citing the Rule as authority to reprimand Mr. Roe for disclosing the substance of the complaint pursuant to the Rule, the Rule is unconstitutional.

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[4] It should be noted that the charges against Mr. Roe were frivolous and therefore dismissed.

Similarly, Kentucky does not have a compelling interest in restricting Mr. Roe, the defendant in the proceeding, from disclosing the fact that a complaint had been filed against him. Presumably, the primary interest of a state in restricting the right of an individual to disclose the information is to protect the attorney from baseless claims. Even if the State has an interest in protecting attorneys from unscrupulous complainants, the State does not have a compelling interest in prohibiting Mr. Roe, the defendant in a bar disciplinary proceeding, from divulging the fact that a complaint had been filed against him. In addition, because the Rule restricts the freedom of expression of the one whom the Rule was intended to protect, the Rule is not narrowly drawn to achieve the State's interest.

2. The Rule Is Misleading and Vague and Therefore Void Under the First Amendment.

The Rule, as applied by the Kentucky Supreme Court in Mr. Roe's case, was void for vagueness and therefore violated the First Amendment. *See Gentile v. State Bar of Nevada*, 581 U.S. 1030 (1991). In *Gentile*, the Court found a Nevada Supreme Court rule prohibiting a lawyer from making extrajudicial statements to the press void for vagueness as applied by the Nevada Supreme Court. The Nevada Supreme Court had held that the attorney violated the rule by statements he made at a press conference. The Nevada rule included an exception which "misled petitioner into thinking that he could give his press conference without fear of discipline." *Id.* at 1048. The Supreme Court held that "[g]iven this grammatical structure, and absent any clarifying interpretation by the state court, the Rule fails to provide 'fair notice to those to whom it is directed.'" *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)). The Supreme Court concluded that "[a] lawyer seeking to avail himself of [the Nevada rule's] protection must guess at its contours . . . The lawyer has no principle for determining

when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated." *Id.*, 501 U.S. at 1048-49.

Similarly, in Mr. Roe's case, the Rule provides an exception upon which Mr. Roe relied in publishing the Bar Complaint. Pursuant to SCR 3.150(1)(c), an attorney may discuss a charge against him with others "to the extent he deems it appropriate consistent with the defense of his case and the practice of his profession."[5] Mr. Roe relied upon this exception to the general confidentiality requirement when he attached a copy of Mr. Smith's Bar Complaint to a pleading in the Bankruptcy Court. By structuring the Rule in such a vague manner that a lawyer in Mr. Roe's position could be misled, the Kentucky Supreme Court misled Mr. Roe into thinking that he could publish the Bar Complaint without fear of discipline. No prior Kentucky judicial decision or published ethics opinion gave an interpretation of the Rule and its exceptions which would have given Mr. Roe fair notice of the Kentucky Supreme Court's eventual interpretation in Mr. Roe's case. The vagueness of the Rule makes discriminatory enforcement a real possibility, in violation of the First Amendment. *Gentile*, 501 U.S. at 1050. Because the Rule

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[5] In fact, the Kentucky Supreme Court adopted the finding of the Board of Governors as follows:

> 7. Respondent believed that the confidentiality requirements of SCR 3.150 were meant to protect the identity of the accused, and not the identity of the complaining party. (Trans. p. 56).
>
> 8. Respondent deemed the disclosure of the bar complaint of Mr. Smith as necessary in the practice of his profession before the Bankruptcy Court. (Trans. p. 58).
>
> 9. Respondent did not seek an order from the Kentucky Supreme Court to allow him to make public the contents of the bar complaint. (Trans. p. 73).

(App., *infra*, 10a)

does not satisfy the strict scrutiny standard and is void for vagueness, the Rule, as applied to Mr. Roe, is unconstitutional.

CONCLUSION

Based upon the foregoing it is readily apparent that there are compelling reasons for the Court to grant Mr. Roe's petition for a writ of certiorari. Despite a groundswell of support for greater public access to bar association disciplinary proceedings and incontrovertible First Amendment law, the Supreme Court of Kentucky privately reprimanded Mr. Roe for disclosing the Bar Complaint of Joe Smith.

By failing to find that the Rule is unconstitutional, the Supreme Court of Kentucky has decided an important question of federal law in a way that conflicts with First Amendment jurisprudence as reported in numerous decisions of United States district and appellate courts. Moreover, to the extent that the Supreme Court of Kentucky appears to be the first court to decide that the speech of a defendant in a bar disciplinary proceeding may be restricted, that Court has decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 27th, 1996

APPENDICES

APPENDIX A

NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

96-SC-529

KENTUCKY BAR ASSOCIATION COMPLAINANT

V. IN THE SUPREME COURT

JOHN ROE RESPONDENT

CONFIDENTIAL ORDER

In a disciplinary proceeding, the Board of Governors of the Kentucky Bar Association concluded that respondent was guilty of the alleged violation and recommended that the respondent be privately reprimanded.

Having reviewed the Board's decision, the Court adopts the findings and recommendations of the Board of Governors. The respondent is hereby privately reprimanded for his conduct. The respondent is directed to pay the costs of this proceeding in the amount of $2,042.52.

Stephens, C.J., Graves, King, and Wintersheimer, JJ., concur.

Baker, Lambert, and Stumbo, JJ., dissent as they find Mr. Roe's actions in this case were not inconsistent with the exceptions found in SR 3.150(c).

ENTERED: August 29, 1996.

/s/_____

Chief Justice

APPENDIX B

SUPREME COURT OF KENTUCKY
KBA FILE 4766

KENTUCKY BAR ASSOCIATION **COMPLAINANT**

v. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF BOARD OF GOVERNORS OF THE KENTUCKY BAR ASSOCIATION**

JOHN ROE **RESPONDENT**

* * *

STATEMENT OF THE CHARGE

The Respondent, John Roe, is charged in one count. The Inquiry Tribunal, pursuant to SCR 3.190, charged that the Respondent represented X Corp., in a Chapter 11 Bankruptcy proceeding, Case No. XX-XXXXX (X) XX, filed in the United States Bankruptcy Court for the Western District of Kentucky at Owensboro. On August 22, 1994, Respondent attached as an exhibit to a pleading filed in Bankruptcy Court a bar complaint filed against Respondent by Joe Smith. The pleading filed on behalf of X Corp. was styled "Response to Appellant's Motion for Stay of Judgment Pending Appeal and for Attorney Fees to Defend Bar Complaint Filed by Joe Smith." The pleading was attached to the charge and incorporated by reference.

The Inquiry Tribunal charged that Respondent's use of the bar complaint as an exhibit to a pleading filed in the records of a bankruptcy proceeding was in violation of the confidentiality requirement of SCR 3.150 which provides in pertinent part:

(1) Subject to the following exceptions, nothing connected with a disciplinary case shall be made public unless so ordered by the court:

(c) An attorney against whom any complaint or charge is pending may elect to discuss his case with others to the extent he deems it appropriate consistent with the defense of his case and practice of his profession.

(d) Upon a final adjudication of any complaint or charge brought against an attorney, the attorney may, if the complaint or charge has been fully dismissed, reveal this fact.

The Inquiry Tribunal also charged, in the same count, that SCR 3.130-3.4 (c) had been violated. This provision provides in pertinent part:

A lawyer shall not:

(c) knowingly or intentionally disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists....

The Inquiry Tribunal took the position that Respondent's unilateral decision to attach the bar complaint filed against him by Joe Smith as an exhibit to a bankruptcy pleading is in violation of a rule of the Supreme Court, specifically SCR 3.150, and by extension is in violation of SCR 3.130-3.4 (c).

The Respondent admitted that he attached a copy of the bar complaint of Mr. Smith as an exhibit to a pleading filed in Bankruptcy Court, but denied that in doing so he violated SCR 3.150. He argued that his publication of the bar complaint falls

within the exception noted in SCR 3.150(1)(c). He further denied any violation of SCR 3.130-3.4 (c), and affirmatively pled that the disclosure requirements of 11 USC §328 (a) and (c) require disclosure of the bar complaint. Respondent further pled that his use of the bar complaint fell within the SCR 3.150(1)(c) exception to the general requirement of confidentiality. Finally, Respondent affirmatively stated that he did not knowingly or intentionally violate the rules of the Supreme Court.

FINDINGS OF FACT

A hearing was held before the Trial Commissioner on December 5, 1995 in Lexington, Kentucky. The only testimony offered by the Complainant was that of Tom Jones, an attorney and expert witness retained by the Kentucky Bar Association. The only testimony offered by the Respondent was that of Mr. Roe himself. The Trial Commissioner found that the following facts were proved by substantial evidence, and the Board makes the same findings:

1. On August 22, 1994, Respondent attached as an exhibit to a pleading filed in Bankruptcy Court, a Bar Complaint filed against him by Joe Smith. (KBA Ex. 2; Trans. pp. 52-54).

2. Respondent considered Mr. Smith's complaint to be without merit, and part of a bad faith effort to interfere with the liquidation of the assets of the bankrupt estate. (Trans. p. 54).

3. Respondent believed he should have the right to claim compensation from the bankrupt estate for his defense of the bar complaint, and believed he had to inform the Bankruptcy Court of the filing of the bar complaint and its content in order to late claim compensation for his efforts, pursuant to the

requirements of 11 USC § 328. (KBA Ex. 4; Trans. pp. 50-58, 76, 80).

4. Hon. William G. Gavel, United States Bankruptcy Judge for the Western District of Kentucky, viewed the bar complaint filed by Joe Smith to be a "sour grapes letter" by a "disgruntled creditor" on a "misguided crusade." (Respondent Ex. 2, pp. 4-5).

5. The bar complaint of Joe Smith against the Respondent was ultimately dismissed. (Trans. pp. 50-51).

6. In the opinion of Mr. Tom Jones, Esq., the expert witness called by the Complainant, it was necessary for the Respondent to inform the Bankruptcy Court that a bar complaint had been filed against him by Mr. Smith. (Trans. pp. 9, 10-14, 27).

7. Respondent believed that the confidentiality requirements of SCR 3.150 were meant to protect the identity of the accused, and not the identity of the complaining party. (Trans. p. 56).

8. Respondent deemed the disclosure of the bar complaint of Mr. Smith as necessary in the practice of his profession before the Bankruptcy Court. (Trans. p. 58).

9. Respondent did not seek an order from the Kentucky Supreme Court to allow him to make public the contents of the bar complaint. (Trans. p. 73).

10. Respondent did not ask the Bankruptcy Court to seal the pleading with the attached bar complaint.

11. Respondent did not knowingly or intentionally disobey the confidentiality provisions of SCR 3.150.

In addition, the Board found:

12. Respondent disobeyed the confidentiality provisions of SCR 3.150 by virtue of attaching as an exhibit to a pleading filed in Bankruptcy Court, the bar complaint filed against him by Mr. Smith. In addition, he did not review SCR 3.150 before deciding to attach the bar complaint to the pleading filed in Bankruptcy Court. (Trans. p. 62). He was also aware that bar disciplinary cases were considered to be confidential, but took the position that the confidentiality was for the protection of the accused lawyer. (Trans. p. 56).

CONCLUSIONS OF LAW

A roll call vote was taken as to the guilt or innocence of the charge against Respondent, John Roe. Respondent was found guilty as charged of the one count charge by a vote of the Board of Governors as follows:

guilty - 12
not Guilty - 3

A sealed envelope supplied by the Director of the Kentucky Bar Association containing a statement of prior discipline, suspensions, withdrawals and resignations pursuant to SCR 3.370(10) with respect to Respondent was opened and contained the following information: Respondent was admitted to practice law in Kentucky on May 1, 1980. Prior discipline consisted of a private admonition issued on November 15, 1996 [sic]. There were no other suspensions, withdrawals and resignations of membership in the Kentucky Bar Association.

The contents of the sealed envelope were considered by the Board in deciding what discipline to be recommended.

A roll call vote was taken as to the discipline to be administered on the basis of the finding of guilt to the one count charge, and the vote was to recommend a private reprimand. The vote on discipline was as follows:

private reprimand - 10
public reprimand - 5

DECISION AND RECOMMENDATION

The Board of Governors of the Kentucky Bar Association recommends to the Supreme Court of Kentucky that the Respondent, John Roe, is guilty of the charge brought against him and that he be punished by a private reprimand, and that he should pay the costs of this matter in the amount of $2,042.52.

This 24 day of May, 1996.

KENTUCKY BAR ASSOCIATION

By: /s/_____
Marcia Milby Ridings
President

APPENDIX C

SUPREME COURT OF KENTUCKY
KBA FILE 4766

KENTUCKY BAR ASSOCIATION COMPLAINANT

VS.

REPORT OF TRIAL COMMISSIONER

JOHN ROE RESPONDENT

** ** ** ** ** ** ** ** ** ** ** ** **

Comes Joseph M. Kelly, the Trial Commissioner appointed in the above-styled and numbered action, and, pursuant to Supreme Court Rule 3.360, files the following report, to-wit:

I. STATEMENT OF CHARGE

The charge against the Respondent is that he engaged in unethical and unprofessional conduct when he attached, as an exhibit to a pleading filed in the United States Bankruptcy Court for the Western District of Kentucky at Owensboro, a bar complaint filed against him by Joe Smith. By filing a copy of the bar complaint as an exhibit, it is alleged that Respondent violated the confidentiality requirement of SCR 3.150, and by extension, SCR 3.130-3.4(c).

II. THE DEFENSE

The Respondent admits that he attached a copy of the bar complaint of Mr. Smith as an exhibit to a pleading filed in bankruptcy court, but denies that in doing so he violated SCR

3.150. He further denies any violation of SCR 3.130-3.4(c), and has affirmatively pled the disclosure requirements of 11 USC § 328 (a) and (c) required disclosure of the bar complaint. Respondent further pled that his use of the bar complaint fell within the SCR 3.150(1)(c) exception to the general requirement of confidentiality. Finally, Respondent affirmatively stated that he did not knowingly or intentionally violate the Rules of the Supreme Court.

III. THE PROCEEDINGS

A hearing was held before the undersigned Trial Commissioner on December 5, 1995, in Lexington, Kentucky. Present were David B. Pearce, Esq., Deputy Bar Counsel; Walker P. Mayo, Esq., counsel for Respondent; and Respondent, John Roe, Esq. Testimony was heard from Tom Jones, Esq., an attorney and expert witness retained by the Kentucky Bar Association, and the Respondent, John Roe, Esq. The only testimony offered by the Complainant was that of Mr. Jones, and the only testimony offered by the Respondent was that of Mr. Roe himself.

IV. THE FACTS WHICH THE TRIAL COMMISSIONER DEEMS PROVED BY SUBSTANTIAL EVIDENCE

1. On August 22, 1994, Respondent attached as an exhibit to a pleading filed in Bankruptcy Court, a bar complaint filed against him by Joe Smith. (KBA Ex. 2; Trans. pp. 52-54).

2. Respondent considered Mr. Smith's complaint to be without merit, and part of a bad faith effort to interfere with the liquidation of the assets of the bankrupt estate. (Trans. p. 54).

3. Respondent believed he should have the right to claim compensation from the bankrupt estate for his defense of the Bar Complaint, and believed he had to inform the Bankruptcy Court of the filing of the Bar Complaint and its content in order to later claim compensation for his efforts, pursuant to the requirements of 11 USC § 328. (KBA Ex 4; Trans. pp. 50-58, 76, 80).

4. Hon. William G. Gavel, United States Bankruptcy Judge for the Western District of Kentucky, viewed the Bar Complaint filed by Joe Smith to be a "sour grapes letter" by a "disgruntled creditor" on a "misguided crusade". (Respondent Ex. 2, pp. 4-5)

5. The Bar Complaint of Joe Smith against the Respondent was ultimately dismissed. (Trans., pp. 50-51).

6. In the opinion of Mr. Tom Jones, Esq., the expert witness called by the Complainant, it was necessary for the Respondent to inform the Bankruptcy Court that a bar complaint had been filed against him by Mr. Smith. (Trans., pp 9, 10-14, 27).

7. Respondent believed that the confidentiality requirements of SCR 3.150 were meant to protect the identity of the accused, and not the identity of the complaining party. (Trans., p. 56)

8. Respondent deemed the disclosure of the bar complaint of Mr. Smith as necessary in the practice of his profession before the Bankruptcy Court. (Trans. p. 58).

9. Respondent did not seek an Order from the Kentucky Supreme Court to allow him to make public the contents of the Bar Complaint (Trans., p. 73).